

IN THE SUPREME COURT OF THE HAWAIIAN ISLANDS.

SPECIAL JANUARY TERM, 1899.

JAS. A. KING, Minister of the Interior of the Republic of Hawaii, on behalf of the Republic of Hawaii *v.* OAHU RAILWAY & LAND COMPANY, a domestic corporation.

APPEAL FROM CIRCUIT JUDGE STANLEY, FIRST CIRCUIT.

SUBMITTED JANUARY 9, 10, AND 11, 1899. DECIDED MARCH 23, 1899.

JUDD, C.J., WHITING, J., AND CIRCUIT JUDGE PERRY, IN PLACE OF FREAR, J., DISQUALIFIED.

A certificate of approval by the Cabinet, in accordance with the statutes, of the location of the Oahu Railway & Land Company does not carry with it the right to condemn land under navigable waters of the harbor of Honolulu and a right of way over the harbor, where the contemporaneous correspondence between the parties and a contemporaneous lease between them plainly indicate that the government had a contrary intention, even though the location approved covers land under navigable waters.

The State has the possession and control of the navigable waters of the said harbor and is a trustee thereof for the public and cannot absolutely alienate such interest.

OPINION OF THE COURT BY JUDD, C.J.

This is a bill in equity for an injunction, as follows:

To the Honorable A. Perry, First Judge of the Circuit Court aforesaid:

The undersigned, James A. King, Minister of the Interior of the Republic of Hawaii, acting in his official capacity for and on behalf of the Government of the Republic of Hawaii, plaintiff herein, complaining of the Oahu Railway & Land Company, Limited, a corporation created under and existing by virtue of the laws of the Republic of Hawaii and doing business on the Island of Oahu, defendant herein, says:

I.

That the Republic of Hawaii is seized in fee simple of all those premises situate in and adjacent to Honolulu harbor, Island of Oahu, and bounded and described as follows (the metes and bounds are identical with those given in the lease hereinafter set out).

II.

That on the 15th day of March, A. D. 1890, Lorrin A. Thurston, Minister of the Interior of the then Hawaiian Kingdom, acting for and on behalf of the Hawaiian Government, leased to the defendant herein the above described premises together with adjacent premises more particularly described in said lease, a copy of which is attached hereto and made a part hereof and marked "Exhibit A."

That under said lease the Government has the right to take possession of the land demised, or any part thereof, together with the improvements on the same or on any portion, which may be so taken, at any time after giving ninety days' notice so to do and the payment or tender to the company of the value of such improvements.

That the Government of the Republic of Hawaii desire to and are about to take over the property demised as aforesaid for the purpose of establishing Government wharves, and in furtherance of such desire and intention, on the 27th day of September, A. D. 1897, it, by James A. King, Minister of the Interior, notified the defendant of its intention to take possession at the end of ninety days from that date of the premises demised as aforesaid, together with all the improvements on the same, not, however, including the coal hoisting plant, and estimating the value of such improvements at \$16,560.00, and further notified the defendant that at the end of said ninety days it would tender and pay said sum, or in lieu thereof such sum as should be agreed upon, or in default of agreement such sum as shall be named by a board of arbitrators according to the provisions of the said lease.

III.

That the premises described by metes and bounds as aforesaid are below low water mark and that the tide ebbs and flows over the same.

IV.

That the land and waters of the harbor of Honolulu and rights appurtenant thereto are the property of the Republic of Hawaii.

V.

That the wharfage and dock facilities of the harbor of Honolulu are inadequate to meet the requirements of shipping, commerce and trade.

VI.

That the Hawaiian Government is proceeding with extensive wharf improvements in the harbor of Honolulu and is taking under the powers vested in it by law, all property facing on said harbor suitable for wharf purposes for the purpose of erecting and maintaining public wharves, and that the property above described is necessary for such purposes.

VII.

That the defendant herein has served notice upon the plaintiff its intention to take and appropriate the property hereinabove

particularly described, together with the perpetual right for it, its successors and assigns, to make, and if necessary to maintain and use the right of way by water for vessels and all other water craft of any draught, whatsoever, over and upon all land and water (the same being owned by the Republic of Hawaii) between the land above described and deep water in Honolulu harbor and every part thereof, and the right for it, its successors and assigns, to sail, haul and otherwise transport vessels and all other water crafts of whatsoever draught across and over the said right of way and every portion thereof, a copy of which notice is hereto attached and made a part hereof and marked "Exhibit B."

That said land and right of way proposed to be appropriated by the defendant are being used for public purposes, to wit: for the sailing, navigation and anchorage of vessels.

That the use to which said property is being put at the present time and the use which the same is about to be put to is a more necessary public use than that for which it is sought to be appropriated by the defendant.

That the Government of the Republic of Hawaii is authorized and empowered by law not only to take all real estate belonging to any person or persons or corporations, together with all structures and improvements thereon, franchises or appurtenances thereunto belonging and all property appropriated to some public use where it appears that the use to which said property is sought to be put is a more necessary public use than that to which it has already been appropriated, but to retain all property vested in it which is being used for public purposes and which is intended to be used for said purposes.

That the proposed action on the part of the defendant is without authority or justification by law, and if permitted to proceed, will work irreparable injury to the Government of the Republic of Hawaii, and to the public rights and interests in navigation, shipping and wharfage, as above set forth, and is contrary to the sovereign rights of the Republic of Hawaii in the ownership of its property.

Wherefore your petitioner prays that the said Oahu Railway & Land Company, Limited, may be enjoined by the mandate of this Honorable Court to desist and refrain from proceeding as aforesaid, and that a writ of injunction issue prohibiting the defendant, its attorneys, servants and agents, from going on with the proceedings to condemn said property as aforesaid, and from entering upon, taking possession of or in any wise interfering with the rights of the Hawaiian Government in the premises aforesaid, or exercising on its part any rights of ownership, and for such other and further relief as to the court seems meet.

After injunction issued by Judge Stanley, on motion of plaintiff, and modification of same, injunction by defendant, demurrer, answer and decision dismissing the bill, such decision being submitted to by plaintiff, plaintiff took a general appeal to this Court. We do not, in view of the general appeal, deem it necessary to enlarge upon in detail the above steps taken in the case.

The exact question before us is whether the plaintiff has a right to a perpetual injunction to prevent the defendant company from condemning, under its alleged right to exercise eminent domain, the property in question. This property is admitted to be that of the Government of Hawaii and it is the land described under navigable water of the harbor of Honolulu. Whether it can be taken by the defendant company depends upon several considerations. If the property in question is not subject to the defendant's right of condemnation the injunction was properly issued and should be made perpetual. This was the view of this Court in *Haw. Com. & Sugar Co. v. Kahului R. R. Co.*, page 479, *ante*.

In order to ascertain whether the property in question is subject to defendant's condemnation proceedings, we must first consider the nature of the property. That the harbors and channels of this country are government property and that such property as well as harbor improvements, construction and repair of public wharves, &c., are under the care and supervision of the Minister of the Interior is evidenced by Secs. 160, 162, 166, 167, 169, 506 and 507 of the Civil Laws of 1897.

It is not denied that the defendant company is under the general Railroad Act of 1878, and has a contract with the Minister of Interior, and has the right to condemn property for public use of the railroad. It holds as the agent of the state the delegated right to exercise eminent domain.

Judge Cooley defines Eminent Domain to be "the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit," &c. Cooley, Const. Lim., Sec. 524, 2d Ed. This author also says that some of those are complete without any action on the part of the state; as is the case with the rights of navigation in its seas, lakes and public rivers, and no specific legislative authority is required in order that the government may use public property for public use, and there is no judicial control over the fact or manner of such use.

We wish to distinguish if possible between the right of the defendant company to exercise eminent domain over property of individuals and property of the state itself. The bill alleges that the "land and right of way proposed to be appropriated by the defendant are being used for public purposes, to wit, for the sailing, navigation and anchorage of vessels," and that the use to which the property is now being put and the use to which it is about to be put is a "more necessary public use than that which it is sought to be appropriated by the defendant." The defendant denied this and was allowed by the court below under plaintiff's objection, to adduce evidence tending to show that defendant had better plans for harbor improvement and dock

facilities and that plaintiff had none. We think that the court made the mistake in considering that the question here was one of "public use" against another public use and that the assertion of the plaintiff's public use as superior to defendant's was a traversable fact. The evidence on this point was improperly admitted and we have not considered it.

It is broadly stated by Randolph (Eminent Domain, Sec. 57) that the property of the state is not subject to the right of eminent domain, because it is already held for such uses as the state may designate. Now the right of the defendant company to condemn private property for public use exists only because this right has been delegated to it by the state, through its legislature. The defendant exercises this authority only as the state's agent and in pursuance of the state eminent domain. The defendant cannot exercise this right against the very authority that transferred it to defendant, except by its express consent. On principle, the defendant has no authority to condemn property already subject to public uses. The doctrine that land of the state held for sale or settlement may be taken for railroad purposes but not such land as is already appropriated for special uses of the government, seems to be sustained by text writers and many adjudged cases. Elliot, R. R. Sec. 765; Randolph Em. Dom., Secs. 50-51; *U. S. v. Chicago*, 7 How. 82.

In this case the court said, "It is not questioned that land within a state purchased by the United States as a mere proprietor, and not reserved or appropriated to any special purpose, may be liable to condemnation for streets or highways like the land of other proprietors, under the rights of eminent domain." In order to authorize such condemnation, the court says that "it must be for a public object, clearly superior or paramount, or to which preference is expressly given by law or the constitution," and the court enjoined the opening of streets in Chicago through land appropriated by the Federal Government for "Fort Dearborn," and the court says further that "it is our duty to support the general government in the exercise of all which is plainly granted to it and is necessary for the efficient discharge of the great powers intrusted to it by the people and the state."

The case before us does not raise the question whether the public lands of the government held for rental, sale or settlement can be condemned by the defendant, in the exercise of eminent domain, and we need not further discuss it. We are limited to the exact question whether the land under the navigable waters of the harbor of Honolulu can be so condemned.

We find much light upon this question from the case of the *Illinois Central R. R. v. Illinois*, 146 U. S. 387, decided in 1892. The rights of the State of Illinois, the City of Chicago and of the Illinois Central R. R. in the harbor of Chicago were discussed and the question was "whether the legislature was competent to deprive the state (by grant to the railroad) of its ownership of the submerged lands of the harbor of Chicago, and of the subsequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant against any future exercise of power over them by the state." We quote from the decision as follows:

"That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."

"A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private